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Prudential Federal Savings and Loan Association v. Wells R. King, et al., George W. Evans and Martha R. Evans, His Wife : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

PRUDENTIAL FEDERAL SAVINGS AND
LOAN ASSOCIATION, a corporation,

Plaintiff and
Appellant,

vs.

WELLS R. KING, et al.,

Defendants,

* * *

GEORGE W. EVANS and MARTHA R.
EVANS, his wife,

Defendants and
Respondents.

No.
11316

BRIEF OF APPELLANT

Appeal From Judgment of the
Third District Court For Salt Lake County
Honorable Bryant H. Croft, Judge

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State of Utah - Salt Lake County

TABLE OF CONTENTS

	Page
INTRODUCTORY STATEMENT	1
STATEMENT OF FACTS	2
ARGUMENT	4
<p>POINT I. THE TRIAL COURT ERRONEOUSLY DISMISSED PLAINTIFF'S CLAIM FOR A DEFICIENCY JUDGMENT AGAINST DEFENDANTS.</p>	
<p>A. THE TRIAL COURT ERRONEOUSLY FAILED TO HOLD THAT PLAINTIFF IS ENTITLED, AS A MATTER OF LAW, TO RECOVER A DEFICIENCY JUDGMENT AGAINST DEFENDANTS UNDER THE PROVISIONS OF ASSIGNMENT A.</p>	4
<p>B. THE TRIAL COURT ERRONEOUSLY FAILED TO HOLD THAT PLAINTIFF IS ENTITLED, AS A MATTER OF LAW, TO RECOVER A DEFICIENCY JUDGMENT AGAINST DEFENDANTS UNDER THE PROVISIONS OF ASSIGNMENT B.</p>	9
CONCLUSION	11

CASES AND STATUTES CITED

Barberich v. Pooshichian, 211 P. 236 (Cal. App. 1922) ..	5
Cutler v. Glenn, 81 S.W.2d 1050 (Tex. Civ. App. 1935) ..	5
Horvath v. Lefton, 176 N.E.2d 877 (Ohio Common Pleas 1961)	5
Lonas v. Metropolitan Mortgage & Securities Co., 432 P.2d 603 (Alaska 1967)	5
Radley v. Smith, 6 Utah 2d 314, 313 P.2d 465 (1957)	5
Zeidler v. Burlingame, 245 N.W. 527 (Mich. 1932)	5
Lonas v. Metropolitan Mortgage & Securities Co., supra, 432 P.2d at 604	6-7

TABLE OF CONTENTS—(Continued)

	Page
Baberich v. Pooshichian, <i>supra</i> , 211 P. at 237-238	7-8
Zeidler v. Burlingame, <i>supra</i> , 245 N.W. at 528	8
Horvath v. Lefton, <i>supra</i> , 176 N.E.2d at 879	8-9
Hoffeld v. United States, 186 U.S. 273, 22 S. Ct. 927, 46 L. Ed. 1160 (1902)	10
Lancaster & Love, Inc. v. Mueller Co., 214 F.2d 353 (8th Cir. 1954)	10
Marsh v. Bowen, 6 A.2d 783 (Pa. 1939)	10
South High School District v. McMillin Paper & Supply Co., 49 Utah 477, 164 P. 1041 (1917)	10
Tullgren v. School District No. 1, 113 N.W.2d 540 (Wis. 1962)	10
Hoffeld v. United States, <i>supra</i> , 186 U.S. at 276	10
Lancaster & Love, Inc. v. Mueller Co., <i>supra</i> , 214 F.2d at 355	10
South High School District v. McMillin Paper & Supply Co., <i>supra</i> , 49 Utah at 486, 164 P. at 1045	10
Marsh v. Bowen, <i>supra</i> , 6 A.2d at 785	11
Tullgren v. School District No. 1, <i>supra</i> , 113 N.W.2d at 544	11

OTHER AUTHORITIES CITED

Corbin, Contracts (1 vol. ed. 1952), p. 857	5, 9
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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff and
Appellant,

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WELLS R. KING, et al.,

Defendants,

* * *

GEORGE W. EVANS and MARTHA R.
EVANS, his wife,

Defendants and
Respondents.

No.
11316

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action for the foreclosure of a Uniform Real Estate Contract as a mortgage and for the recovery of a personal judgment for the resulting deficiency.

DISPOSITION IN LOWER COURT

The real property covered by the subject Contract (R-11) was sold at Sheriff's Sale under a judgment entered pursuant to a Stipulation between the

parties. Thereafter at pretrial Plaintiff-Appellant (hereinafter called "plaintiff") made a Motion for Summary Judgment against Defendants-Respondents (hereinafter called "defendants") for the amount of the resulting deficiency. Said Motion was denied, and plaintiff's Complaint against defendants was thereupon dismissed by the trial court with prejudice.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the denial of its Motion for Summary Judgment as against defendants and seeks the entry of judgment in favor of plaintiff and against defendants for the amount of the deficiency.

STATEMENT OF FACTS

The record herein establishes the following uncontroverted facts. On February 1, 1962, Maurer Development Corp., as Seller, entered into a certain Uniform Real Estate Contract (R-11) with Wells R. King and Eliza R. King, his wife (hereinafter called "Kings"), as Buyers. Thereafter, on November 27, 1963, Maurer Development Corp. assigned and conveyed the Seller's interest under said Contract to plaintiff and plaintiff has at all times subsequent thereto been the owner and holder of such interest.

On August 15, 1962, the Kings, as Assignors, and the defendants, as Assignees, executed a certain Assignment of Contract (R-27), hereinafter

called "Assignment A," whereby the Kings assigned the Buyer's interest under said Contract to defendants. Paragraph 3 of Assignment A provides:

"That in consideration of the assignors executing and delivering this agreement, the assignees covenant with the assignors as follows:

a. That the assignees will duly keep, observe and perform all of the terms, conditions and provisions of the said agreement that are to be kept, observed and performed by the assignors.

b. That the assignees will save and hold harmless the assignors of and from any and all actions, suits, costs, damages, claims and demands whatsoever arising by reason of an act or omission of the assignees."

On July 22, 1966, plaintiff gave notice to defendants that said Contract was in default and that plaintiff had elected, pursuant to the provisions of Paragraph 16C thereof, to declare the entire remaining balance owing thereunder at once due and payable, to treat said Contract as a note and mortgage, and to proceed immediately to foreclose the same. On August 1, 1966, plaintiff filed its Complaint herein (R-1).

On March 20, 1967, the Kings, by an Assignment (R-41), hereinafter called "Assignment B", assigned to plaintiff all of their interest in, to and under Paragraph 3 of Assignment A.

On May 9, 1967, plaintiff moved for Summary Judgment, which motion was, on May 29, 1967, denied without prejudice to reassert said Motion at

pretrial. On June 12, 1967, the Court, pursuant to a Stipulation (R-49) between all parties not in default, ordered that the subject real property be sold at Sheriff's Sale without prejudice to any claims that plaintiff may then have had against defendants for the recovery of a deficiency judgment.

On July 18, 1967, said Sheriff's Sale was held, and the subject real property was sold to plaintiff, thereby establishing the deficiency in question.

On April 25, 1968, pretrial was held at which time plaintiff reasserted its Motion for Summary Judgment against defendants for the amount of said deficiency. Said Motion was denied, and on May 28, 1968, Judgment was entered dismissing plaintiff's Complaint against defendants.

ARGUMENT

POINT I

THE TRIAL COURT ERRONEOUSLY DISMISSED PLAINTIFF'S CLAIM FOR A DEFICIENCY JUDGMENT AGAINST DEFENDANTS.

A. THE TRIAL COURT ERRONEOUSLY FAILED TO HOLD THAT PLAINTIFF IS ENTITLED, AS A MATTER OF LAW, TO RECOVER A DEFICIENCY JUDGMENT AGAINST DEFENDANTS UNDER THE PROVISIONS OF ASSIGNMENT A.

It is admitted that defendants executed Assignment A (R-33). Under the terms of Assignment A, defendants promised to perform all of the obliga-

tions of the Buyers under said Contract and to save and hold the Kings harmless therefrom.

It is well settled that the assignee of a contract who agrees to assume the obligations of the assignor under such contract is liable as a matter of law to the other party to the contract for any breach thereunder. *Radley v. Smith*, 6 Utah 2d 314, 313 P.2d 465 (1957); *Lonas v. Metropolitan Mortgage & Securities Co.*, 432 P.2d 603 (Alaska 1967); *Barberich v. Pooshichian*, 211 P. 236 (Cal. App. 1922); *Zeidler v. Burlingame*, 245 N.W. 527 (Mich. 1932); *Horvath v. Lefton*, 176 N.E.2d 877 (Ohio Common Pleas 1961); *Cutler v. Glenn*, 81 S.W.2d 1050 (Tex. Civ. App. 1935); *Corbin, Contracts* (1 vol. ed. 1952), p. 857.

The *Radley* case, decided by this Court in 1957, is very much in point with this case. In *Radley*, the defendant was the assignee of the Seller's interest in a real estate contract and the plaintiff was the Buyer. The defendant-assignee denied having assumed the liabilities of the assignor, the assignment of contract not having contained an assumption agreement as does Assignment A. The trial court found, however, that the defendant-assignee had assumed the liabilities of the assignor. This Court held that, having assumed the liabilities of the assignor, the defendant-assignee was liable to the plaintiff-buyer for breach of contract as a matter of law.

In the *Lonas* case, a concern by the name of Master Builders, Inc., as Sellers, entered into a real estate contract with a couple named Beck, as Buyers. Master Builders, Inc. thereafter assigned all of

the Seller's interest in the contract to the appellees and the Becks likewise assigned all of the Buyer's interest in the contract to the appellants, who agreed to perform all of the obligations of the Buyer under the contract. The appellees subsequently brought an action against the appellants for breach of contract. In reviewing the case on appeal, the court discussed the applicable law as follows in 432 P.2d at 604:

"Appellants contend that the court erred in finding that they were indebted to appellee, because the assignment of the contract was an agreement solely between appellants and the Becks and there was no privity of contract between appellants and appellee.

"With regard to contracts for the sale of land, it is the general rule that the assignee of the purchaser is not liable to the seller for the purchase price by reason of the assignment alone, and becomes liable only if he assumes that obligation in his contract with the purchaser. There was such an assumption of obligation here. In the assignment from the Becks to appellants, signed by both parties, the appellants agreed with the Becks that 'they will pay the balance due on said real estate contract and that the balance due thereon will become the obligation of the Assignees,' and that appellants would 'observe and perform all the terms, conditions, and covenants mentioned in said contract * * *.' Since performance of the Becks' promise to pay the purchase price of the property would benefit someone other than the Becks, that is, the seller, and would satisfy the Becks' duty to the seller, the latter was a creditor beneficiary, and *the appellants' promise to discharge the Becks' obligation under the contract created a duty of appellants to the seller to perform the promise. As a*

creditor beneficiary the seller could recover judgment against either the Becks or the appellants or against each of them as to the purchaser's obligation under the contract. The trial court was correct in entering judgment against appellants for the moneys due under the contract." [Emphasis added.]

In *Barberich*, the plaintiffs, as Sellers, entered into a contract for the purchase and sale of real property with an individual named Pooshichian, as Buyer. Pooshichian thereafter assigned the Buyer's interest in the contract to appellants, who agreed to perform all of the obligations of the Buyer under the contract. The plaintiff subsequently brought an action to forfeit the contract and for breach of contract. In 211 P. at 237-238, the court observed:

"However, the appellants contend that, as assignees of the vendee, they were not obligated to perform the obligations cast upon the original vendee by the contract, and therefore may not be charged with damages for a breach of such obligations. The general rule is that the mere assignment of rights under an executory contract does not cast upon the assignee any of the personal liabilities imposed by the contract upon the assignor. [Citations.] *But the rule is, of course, otherwise in a case where the assignee obligates himself to perform the covenants binding upon his assignor.*

"There was no evidence offered upon this question in the instant case, but it is alleged in the complaint:

' . . . that each * * * of said defendants [the appellants] has assumed and promised, undertaken, and agreed to keep, observe, and comply with each and all of the terms and conditions in said contract contained on the part

of the original vendee therein named. * * *

“These allegations were not denied by said defendants, and the trial court found that they were true. Appellants are liable, therefore, for a breach of these obligations because of the privity of contract existing between the parties.” [Emphasis added.]

In *Zeidler*, the plaintiffs as Sellers had entered into a land contract with an individual named Burlingame, as Buyer. Burlingame thereafter assigned the Buyer's interest in the contract to Suffrin, who assumed the Buyer's obligations under the contract. The plaintiff subsequently commenced an action for foreclosure of the contract and sought a deficiency judgment against Suffrin. In 245 N.W. at 528, the court stated:

“The right of plaintiff to deficiency decree against Suffrin does not depend upon an assumption of liability by the latter, of a character which would produce privity of contract between plaintiff and Suffrin, as was involved in *Sloman v. Cutler*, 258 Mich. 373, 242 N.W. 735, a suit at law. *If the assumption of liability is effective as between Burlingame and Suffrin, the latter would be subject to deficiency decree.* *Barnard v. Huff*, 252 Mich. 258, 233 N.W. 213 77 A.L.R. 259; *Hamburger v. Russell*, 255 Mich. 696, 239 N.W. 267.” [Emphasis added.]

In *Horvath*, the court stated the applicable rule as follows in 176 N.E.2d at 879:

“Granted, a mere assignment of a contract does not operate to cast on an Assignee the liabilities imposed by contract on Assignor . . . but where the Assignee agrees to assume the obligations then the debtor may sue him . . . as a creditor-benefi-

ciary of the Assignee's contract and it is not necessary for the debtor to discharge the Assignor. . . ."

In *Corbin, Contracts* (1 vol. ed. 1952) the author states the rule as follows at page 857:

"If the assignee contracts with his assignor to discharge the duties of the assignor to the third party, the latter is a creditor beneficiary of that contract. . . . Also, if the assignee fails to perform his contract with assignor, the third party can maintain suit against the assignee, as a creditor beneficiary of the assignee's contract."

Under the terms of Assignment A, defendants agreed and became obligated as a matter of law to perform all of the obligations of the Buyers under said Contract, including the payment of all sums due on said Contract. The terms of Assignment A are clear and unambiguous. Having agreed without qualification to pay and perform all of the obligations of the Buyers, defendants are liable to plaintiff as a matter of law for the deficiency still owing under said Contract.

B. THE TRIAL COURT ERRONEOUSLY FAILED TO HOLD THAT PLAINTIFF IS ENTITLED, AS A MATTER OF LAW, TO RECOVER A DEFICIENCY JUDGMENT AGAINST DEFENDANTS UNDER THE PROVISIONS OF ASSIGNMENT B.

Under the provisions of Paragraph 3 of Assignment A, defendants promised that they would "duly keep, observe and perform all of the terms, conditions and provisions" of said Contract that were to

be kept, observed and performed by the Kings. Under the provisions of Assignment B (R-41), the Kings assigned all of their rights under Paragraph 3 of Assignment A (R-27) to plaintiff. It is well settled law that the assignee of rights under a contract acquires all of the rights and remedies of his assignor under such contract. *Hoffeld v. United States*, 186 U.S. 273, 22 S. Ct. 927, 46 L. Ed. 1160 (1902); *South High School District v. McMillin Paper & Supply Co.*, 49 Utah 477, 164 P. 1041 (1917); *Lancaster & Love, Inc. v. Mueller Co.*, 214 F.2d 353 (8th Cir. 1954); *Marsh v. Bowen*, 6 A.2d 783 (Pa. 1939); *Tullgren v. School District No. 1*, 113 N.W.2d 540 (Wis. 1962).

In *Hoffeld*, the United States Supreme Court held in 186 U.S. at 276:

“A voluntary assignee is ordinarily invested with all the rights which his assignor possessed, with respect to the property A voluntary assignee takes the property with all the rights thereto possessed by his assignor”

In *South High*, this Court stated in 49 Utah at 486, 164 P. at 1045:

“It is elementary that the assignee of a mere chose in action takes precisely what rights the assignor had therein, no more, no less.”

In *Lancaster*, the court stated in 214 F.2d at 355:

“An assignee takes the subject of the assignment with all the rights and remedies thereto possessed by the assignor.”

In *Marsh*, the Court stated in 6 A.2d at 785:

"The familiar doctrine that an assignee of a non-negotiable chose in action takes all the rights of his assignor and is subject to the equities against him needs no citation of authority."

In *Tullgren*, the Court stated in 113 N.W.2d at 544:

"The Assignment on its face was complete and unqualified. It disposed of all the right, title and interest held by Mrs. Tullgren. In 6 C.J.S. Assignments § 82, p. 1136, it is stated:

'As a general rule, a valid and unqualified assignment operates to transfer to the assignee all the right, title, or interest of the assignor in the thing assigned'

Defendants agreed and became obligated under Assignment A to "duly keep, observe and perform" all of the Buyer's obligations under the Contract, and to "save and hold harmless the assignors." Under Assignment B the Kings assigned all of their rights against defendants under Assignment B to plaintiff. Therefore, plaintiff is entitled as a matter of law in any event to recover a deficiency judgment against the defendants.

CONCLUSION

For the reasons stated herein, this Court should reverse the judgment of the trial court dismissing plaintiff's claim to a deficiency judgment against

defendants and grant plaintiff a judgment against defendants for the subject deficiency.

Respectfully submitted,

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